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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 470, 472

ILLINOIS COMMERCE COMMISSION, et al., etc.,
Petitioners,

vs.

GREAT LAKES ELEVATOR CORPORATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONERS, DANIEL F. RICE & CO., A PARTNERSHIP.

IRVIN ROOKS,
LEE A. FREEMAN,
Attorneys for Daniel F. Rice, Joseph J. Rice, Walter T. Rice, and William F. Rowley, doing business under the firm name of Daniel F. Rice & Co., a partnership,
Petitioners.

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INTRODUCTORY STATEMENT

Respondents criticize our statement of the case for failing to set forth fully the allegations of their complaint. They proceed to supplement our statement with a detailed summary of their complaint for injunction. This summary is characterized as a recitation of "facts appearing in the record". (Resp. Br. 5) Counsel, however, fail to inform the court that the material allegations in the complaint were specifically denied by a verified answer filed

by Rice (R. 43-9).[1] Affidavits filed by respondents deal with only some of these allegations. (R. 60-75) Many of the allegations remain unestablished, and therefore cannot properly be referred to as "facts" of record.

The questions presented for decision, however, depend almost entirely upon an analysis of state and federal laws and regulations.

I.

PRINCIPLES OF SUPERSEDURE PRESENTED IN OUR ORIGINAL BRIEF ARE NOT DENIED.

There is substantial agreement with respect to the principles of law involved. We have urged that congressional intent to supersede state authority is never presumed, but must be clearly manifested; and further that supersedure will occur only where there is a precise coincidence of regulation or an actual and irreconcilable conflict between the state and federal systems.

The government, in its brief *amicus curiae*, takes the position that federal regulation exists as to the precise subject matters involved before the Illinois Commission, or in the absence of such precise coverage, that the particular matter of regulation is ancillary to and necessarily a part of expressly delegated federal authority. They urge (Govt. Br. 9):

> "The State regulatory laws invoked by the Rice complaint have been superseded by the United States

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[1]Our record references are to the transcript of record printed by the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, and forwarded with our petition for writ of certiorari. When the transcript of record was reprinted by the Clerk of this Court, we found that the page references varied from the first record. Respondents have used the second printing for their record references. We are distressed by this confusion, but believe a minimum of inconvenience will result, since few factual issues are involved, and none which depend upon record references.

> Warehouse Act because they relate to particular fields of regulation that have been specifically occupied by the Federal act, and their enforcement in those fields would plainly infringe the policy of Congress. It is not necessary to show that the provisions of the State and Federal acts are in irreconcilable conflict. It is enough that *the proposed State regulation relates to the precise subject matter regulated by the Federal act*, because with respect to that subject matter it was the policy of Congress to assume exclusive jurisdiction."[2]

Respondents, on the other hand, rely principally upon alleged conflicts between the two authorities. In contrast to the government's position, the warehousemen urge (Resp. Br. 22-3):

> "* * * it is immaterial, if such be the case, that the federal laws may not have expressly or completely dealt with all phases of regulations now in issue. Since Congress has by the express language of the 1931 amendments preempted and occupied the field of the regulation of federal warehouses, State laws—whether coextensive with, supplemental to, in aid of, or different from the federal act—are superseded and rendered inoperative."

Both briefs claim that the exercise of state regulation would infringe federal policy.

The position of the respondents is not free from inconsistencies, for while claiming repeatedly that reputed head-on conflicts with state authority, are the reason why supersedure must result (Resp. Br. 17-8, 36-59 *passim*), they nevertheless urge (Resp. Br. 2) that the:

> "* * * United States Warehouse Act, has so occupied and pre-empted the field of regulation of grain warehouses licensed under that Act as to deprive the Illinois Commerce Commission of judisdiction to regulate such warehouses * * *."

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[2] Italics in quoted material throughout this brief have been supplied for emphasis.

The attempt to apply the theory of congressional occupancy of the field as a basis for supersedure, as Chief Justice Hughes said in the case of *Kelly* v. *Washington*, 302 U. S. 1 (1937), presupposes the absence of direct conflict. He discussed that question as follows (p. 9):

> "The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government. 186 Wash. pp. 593, 596, 59 P. (2d) 373. And this is the argument pressed by respondents and the Solicitor General.
>
> "This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character."

The apparent reluctance of respondents to take a definite stand necessitates some discussion of the legal principles they seek to develop. Respondents would characterize their public warehouses as "interstate instrumentalities", thus creating a psychological basis for freeing them from state regulation. While it is true that the warehouses involved affect interstate commerce, nevertheless they have a single local situs. They are similar in that respect to a steel plant or a manufacturing establishment which may be subject to some federal control because of the movement of commodities in commerce through such plants, but such regulation involves a federal invasion of a field normally reserved to the states.

In such instances Congress has been slow to act, and this court has refused lightly to extend federal authority to effect a supersedure of the otherwise permissive exercise of state police powers.

Where a regulatory issue has been customarily dealt with on the national level, the court has more willingly

favored preemption. In those cases, as distinguished from warehousing regulation which has been traditionally a state function, the court has not required as rigorous an adherence to the rule of precise coincidence or irreconcilable conflict. A desire to protect federal policy from infringement and federal objectives from interference was manifest. But even so, the court has required that the state function either conflict with or "plainly and palpably" infringe federal policy: *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766 (1945).[3]

The cases relied upon by respondents to support supersedure of state regulation deal largely with matters which are of a national character, or with instrumentalities such as railroads, whose operations extend through many states, vulnerable to the burdens of multiple, varied state requirements, and who are subject to very comprehensive and complete affirmative federal regulation. In those instances, concomitant state regulation is more difficult to justify.

Thus, in *Prigg* v. *Commonwealth of Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the validity of an 1826 Pennsylvania criminal statute was involved, under which a convic-

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[3] In *Supersedure of State Laws by Federal Regulation under the Commerce Clause*, 86 U. of Pa. L. Rev. 532 (1938), the author after a careful review of the cases finds that the Supreme Court has consistently demonstrated diligence in upholding state "quarantine", "food and drug", "game conservation", "warehouses and exchanges", and "vessel pilots" laws, but that "with the exception of isolated instances, the tendency to nullify state control over railroads has been marked. • • • More recent cases, however, would indicate a trend away from this judicial paternalism • • •." In his conclusion the author states (p. 539):

"With the exception of a few anomalous decisions, and those relating to railroad regulation, it is evident that, in the absence of express provisions to the contrary, actual conflict or coincidence has provided the real test as to the supersedure of the state rule. Thus, the extensive theories propounded in relation to Congressional 'occupation of the field' despite the absence of conflict or coincidence, appear to find but limited support in the actual holdings."

tion had resulted for seizing a fugitive slave and returning her to Maryland. The court set aside the conviction, pointing to Article IV, Section 2 of the Constitution, and the Federal Act of 1793 relating to fugitive slaves. The subject matter was expressly dealt with in the Constitution, and was one over which federal control had been assumed from the inception of our present form of government.

Similarly, in *Hines* v. *Davidowitz,* 312 U.S. 52 (1941), a Pennsylvania alien registration law was held to be superseded because, as the court said, it affected a field of "international relations".[4]

The case of *First Iowa Hydro-Electric Coop.* v. *F.P.C.,* 328 U.S. 152, 180 (1946) involved a state requirement which directly conflicted with and served as a "veto power" over the "comprehensive development of the water resources of the Nation" entrusted by Congress to the Federal Power Commission.

Finally, several railroad cases are cited by respondents, but even with respect to such cases, actual and positive conflict or precise coincidence over a detail of regulatory control was found.

In *Southern Railway Co.* v. *R. R. Comm. of Indiana,* 236 U.S. 439 (1915), the state statute required secure grab-irons and hand-holds on the sides or ends of every railroad car, while the federal act imposed penalties for failing to equip cars with hand-holds. A coincidence of regulation existed upon the precise subject matter involved.

Similarly in *Napier* v. *Atlantic Coast Line,* 272 U.S. 605 (1926), the court found (p. 612):

> "The federal and the state statutes are directed to the same subject—the equipment of locomotives."

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[4]See discussion of *Hines* case in our original brief, p. 26.

In *New York Central* v. *Winfield*, 244 U.S. 147, 151 (1917), the state act imposed liability for injuries not resulting from negligence in the face of the federal act making negligence the basis of liability. Direct conflict.

In *Charleston & W. C. Ry. Co.* v. *Varnville Co.*, 237 U.S. 597 (1915), state and federal laws imposed differing and conflicting liabilities upon a carrier for loss or damage to interstate shipments handled by the carrier. The court in abrogating the state law said (p. 603):

> "It overlaps the Federal act in respect of the subjects, the grounds, and the extent of liability for loss."

In the above railroad cases the precise detail of regulation was specifically controlled by Congress. No claim was made that a general delegation to the Interstate Commission to regulate service and safety would nullify a specific state service requirement prior to an actual order rendered by the commission in conflict with the precise requirement. For example, in *Atlantic Coast Line* v. *Georgia*, 234 U.S. 280 (1914), a state requirement of specified locomotive headlights was upheld, notwithstanding congressional enactments relating to almost every other type of locomotive equipment, and the delegation to the Interstate Commission of general authority to regulate railroad service and safety. In recent cases involving railroads the court has sustained state safety and convenience requirements as against claimed federal conflict: *Terminal R. R. Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943—cabooses on interstate trains operated in terminal areas); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945—state train length limitation laws).

The decision in *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942), which involved health regulations in connection with the manufacture of butter, is cited in support

of the proposition that state regulation may be precluded by a "clear implication or inconsistency", although "not expressly in conflict with the federal act". (Resp. Br. 32) We submit that this construction of the case is unsound. The issue upon which the decision turned was the existence of actual conflict. The court says, as a basis for its decision (p. 167):

> "Coming finally to the query whether the state's claim interferes or *conflicts* with the purpose or provision of the federal legislation, *we determine that it does.*"

And further (p. 168):

> "Confiscation by the state of material in production *nullifies* federal discretion over ingredients."

The principles announced in the *Kelly, Savage* and other similar cases where irreconcilable conflict was the standard applied, were cited in the *Cloverleaf* case with approval.

Forty-one states have provided for some form of warehousing regulation. This does not mean that there is here involved "multiple" state regulation affecting any single public warehouseman, as respondents have urged. (Resp. Br. 32, 38, 60) A single warehouse can be regulated by only one of the forty-one states, for it is located in only one state and all of its activities are conducted there.

II.

THE UNITED STATES WAREHOUSE ACT IS LIMITED AND CIRCUMSCRIBED IN ITS PROVISIONS, SCOPE AND PURPOSE.

We have urged that the United States Warehouse Act sought the establishment of a warehouse receipt of accepted value as collateral on loans, and have characterized the act as in essence a warehouse receipt act. In so doing, we rec-

ognize that to accomplish the congressional objective of fostering and promoting a dependable warehouse receipt, certain limited controls and supervision were necessary. Such supervision is embodied in the federal act—but all essential aspects of the act relate to that sole purpose and objective. A license and bond are required to assure the character and financial ability of warehousemen. Inspection and weighing of agricultural products is intended to promote uniformity of the commodity covered by the receipt. The examination and inspection of warehouses, the records required and the few duties imposed upon warehousemen with respect to the care and delivery of products stored are clearly directed toward the same program—to make certain that outstanding receipts are supported by actual grain in store in the amount and quality indicated. Finally, many specific provisions deal with the issuance, form and cancellation of warehouse receipts.

Respondents do not take issue with our characterization of the federal act, as a warehouse receipt act but quote legislative history to indicate that the United States Warehouse Act was much broader and "covered all phases of warehouse regulation and operation". (Resp. Br 25) The history quoted only makes more conclusive our assertion that the intent of Congress was to achieve the limited purpose of fostering a warehouse receipt which would be acceptable by bankers, and therefore more readily usable by farmers in marketing their products.[5]

The government concedes that the federal act "was intended to establish a warehouse receipt system", but concludes that such a objective "can be attained only by means of detailed regulation of the warehousing business

[5]See particularly pp. 61-4 of respondents' brief, where the congressional debates are in part set forth. The court below appears to agree that the federal act is in nature, form and intent essentially a warehouse receipt act. (R. 117)

itself * * *." (Govt. Br. 32) That conclusion is unwarranted. The details of control or supervision contained in the federal act insure that the commodity in the stated amount and quality is in store against each receipt outstanding, but no detailed regulation of the business of warehousing as a public utility is anywhere provided.

We are told by the government that if Congress only intended to establish a form of warehouse receipt, "it would in all probability have enacted legislation similar to the Uniform Warehouse Receipts Act, which had been adopted by 32 states and the District of Columbia at the time Congress had the subject under consideration". (Govt. Br. 29) But Congress did have in mind the Uniform Warehouse Receipts Act, and did feel that it was adopting a federal act which at least in part was of that character.

Congressman Lever, during debates on the proposed federal act in the House, was asked:

> "Mr. Smith of Michigan: Can the gentleman tell how many states have a warehouse system?
>
> "Mr. Lever: There are thirty-one states that have adopted the Uniform Warehouse Receipts Act."[6]

The federal act fostered a dependable warehouse receipt by following the provisions of the Uniform Warehouse Receipts Act (see legislative history quoted in Resp. Br. 62), and by adding limited supervision by a federal agency to make certain the commodity stored was where it should be at the right time, and in the proper amount and quality.

An analysis of the collateral provisions of the federal statute manifestly reveals this fact. For example, the records required to be kept are records of the products stored and receipts issued (Sec. 23); the accounts prescribed by the secretary in Regulation 5, Section 5 are not

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[6] 53 Cong. Rec. Pt. 6, p. 5926 (1916).

accounts to assist in the determination of rates or the financial results of operations, but only accounts which will reveal the amount of grain received and delivered, receipts issued and cancelled, and insurance provided.

The penalty section of the statute (Sec. 30) again clearly indicates this positive focus upon the establishment of dependable receipts, and nothing more. The only penalties provided are for falsely representing oneself as a federally licensed or bonded warehouse, issuing fraudulent receipts, fraudulently classifying or weighing products stored, and converting stored products to one's own use.[7]

All of the other provisions of the act may be similarly analyzed to demonstrate their close adherence to the single purpose of fostering a warehouse receipts system. Any attempt to extend the plain language of the statute to encompass utility regulatory authority does violence to congressional intent and terminology.

Neither do the regulations issued by the secretary broaden the limited supervisory authority delegated. These regulations are issued "for the efficient execution of the provisions of this Act". (Sec. 28) The regulations follow the pattern of the act, and are solely directed to the promotion of a dependable warehouse receipt. They do not add to the secretary's authority, since such authority can be found only in the federal statute which is the charter of the secretary's power.[8] We do not dispute the validity of the regulations adopted, but we do dispute counsel's at-

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[7]The government's reference (Govt. Br. 35, 55) to the penalty section as in any way in aid of the specific regulatory issues involved before the Illinois Commission is in error and misleading.

[8]*Morrill* v. *Jones*, 106 U. S. 466, 467 (1883); *Williamson* v. *U. S.*, 207 U. S. 425, 462 (1908); *U. S.* v. *United Verde Copper Co.*, 196 U. S. 207, 215 (1905); *Waite* v. *Macy*, 246 U. S. 606, 608-9 (1918); *Miller* v. *U. S.*, 294 U. S. 435, 440 (1935).

tempt to construe and extend those regulations beyond their compass and limited purpose.

Respondents have adopted the slogan that the United States Warehouse Act constitutes a "broad general regulatory scheme". (Resp. Br. 26, 28) To repeat that characterization does not make it so. Proof of that argument must lie in an analysis of the terms and provisions of the act itself.

We have set forth a complete summary of the United States Warehouse Act on pp. 28-30 of our original brief. No question has been raised over the accuracy or completeness of that summary. Yet it stands as undeniable refutation of the claim that the federal act is "broad" or even a regulatory system.

This court on three occasions has characterized the United States Warehouse Act as affording only a "measure of control".[9]

In the *Union Brokerage* case, the United States Warehouse Act was likened to the Tariff Act of 1930 as involving only "circumscribed control" which did not imply immunity from state regulation.

Primarily, the factor that conclusively negatives the United States Warehouse Act as in any way being a broad system of regulation is the almost complete absence of adjudicatory powers in the secretary. He is granted authority to issue, suspend and revoke a voluntary license. That is the full extent of his affirmative functions. In every other respect the secretary is lacking in legislative authority to consider a regulatory problem and direct or compel any action to be taken. We have argued in our original

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[9] *Federal Compress and Whse. Co.* v. *McLean*, 291 U. S. 17, 22-3 (1934); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 207-8 (1944); *Townsend* v. *Yeomans*, 301 U. S. 441, 457-(1937).

brief that the *secretary is completely without power and authority to grant any of the relief sought before the Illinois Commission.* That fact is of fundamental importance to an understanding of the United States Warehouse Act. Our statement has not been refuted or answered by either the respondents or the government. It therefore must be considered as conceded.

In no sense is the act regulatory as we understand that term. It does not provide for adjudication of utility problems presented by complaint or on the secretary's own motion. First, there is no provision for the filing of complaints with the secretary. No machinery was set up to bring public grievances to his attention. Second, no provision is made and no authority exists for the conduct of hearings on any of the multitudinous problems involved in utility operations (aside from a license suspension or revocation). Third, no legislative standards have been expressed to control the disposition of utility regulatory problems. Fourth, no authority is granted to the secretary to issue any orders, directives or to take any other form of action which would compel a warehouse utility to pursue a course of conduct in the future. This, of course, is the essence of regulation. Fifth, since no provision is made for regulatory orders, of course there are no requirements that findings of fact be made, no allowance for petitions for rehearing, and no specification of judicial review.

We have urged that if the secretary were to exercise affirmative authority under the present federal act, his actions would violate due process because of the absence of appropriate legislative standards, provisions for findings of fact and judicial review.[10] This position has not been disputed.

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[10]Original brief, p. 34.

In short, the secretary cannot prescribe utility rates, utility services or other conditions or practices for the future. He cannot act prospectively, a power common to all utility regulatory authorities. If there is a violation of the limited provisions of the statute—a past event—he may cancel a permissive license; but he has no statutory authority to correct the practice or prescribe the precise terms and details of its future exercise. The government has departed from the record to lay stress upon the fact that the secretary has held conferences with erring warehouse utilities, and has negotiated or wheedled or coaxed a modification of then existing conditions. But this argument, we submit, completely refutes the existence of affirmative utility regulatory powers.

This absence of mandatory authority must be considered, furthermore, in the light of the fact that the act does not require a license from any warehouseman. It is voluntarily applied for, and the secretary's representative, since the act's inception, has striven mightily to coax warehousemen into the federal system.[11] Obviously, the administrator is not going to make it too difficult for the licensee he is so anxious to retain under his supervision.[12]

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[11]Misc. Circ. No. 51, issued 1926, reprinted 1932, *"The Farmer and the United States Warehouse Act,"* p. 14:

"If the warehousemen in the community where the farmer takes his products for storage is not operating under the Federal law, and the farmer desires the benefit of this law, he should let the warehouseman know that if he wants his business the warehouse must be operated under the law. • • • It rests then with the farmer to say whether he shall have a warehouse receipt issued under the Federal warehouse act."

[12]Shepherd *"Marketing Farm Products"* (1946). The author of the book, a professor of Iowa State College, after reviewing the United States Warehouse Act and its administration, says (p. 233):

"The voluntary nature of the service has another undesirable result. Warehousemen who want to engage in warehousing practices that are generally regarded as improper will not of course apply for licenses under the Act. The USWA [United States Ware-

An analysis of any of the utility regulatory issues presented to the Illinois Commission reveals the complete bankruptcy of the secretary's position under the United States Warehouse Act. Let us assume a warehouseman has rebated considerable storage charges to one of his customers as part of the sale of grain which the warehouseman himself is merchandising. The parties adversely affected by the discrimination may desire to seek redress under the federal act. No statutory provision is made for a complaint, but suppose they contact the administrator and tell their story. No formal hearings can be held. If they were, the administrative hearings would be entirely without legal standing. But let us assume the secretary investigates and finds the facts to be as reported. He cannot compel the warehouseman to change his practice. He cannot order new rates or practices to be instituted, nor can he award reparations as a means of redressing the past serious damage. The secretary can only discuss the matter with the warehouseman, and if he is fortunate, he may secure some kind of compromise. In the absence of such a compromise, he either has to forget the matter or revoke the voluntary license. But if the license is revoked, the warehouseman is free to function without a federal license, and that leaves the complainants still subject to the same ruinous discrimination.

The respondents, however, argue that when a license is revoked, state regulation immediately takes hold and future

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house Act], therefore, cannot improve those warehousemen's operations. Furthermore, when any one of the warehousemen who are licensed under the Act infringes its regulations in some minor way, the administrators of the Act face a difficult problem. If they suspend or cancel his license because of the infraction, that forces him out of the system. He is then free to continue his objectionable practice, and in addition is free to do many other things which he probably would not try to do if he had remained under license. The cancellation of his license protects the reputation of the USWA, but it does not do anything to improve the practices of that particular warehouseman. It may in fact make them worse."

protection is forthcoming. This argument emphatically admits that regulatory power and control exist only on the state level. Affirmative utility regulatory action can be exercised only by the state, and whether a federal license exists or not, that statement is still true—the federal agency is without the power sought to be invoked before the Illinois Commission. It naturally follows, therefore, that no conflict or inconsistency between the two systems could possibly exist.

Respondents do not deny that the secretary is completely without power to issue an affirmative order or legally to compel a warehouse utility to pursue some future course of action—but we are criticized for our emphasis of the fact that "the United States Warehouse Act lacks the usual provisions found in statutes regulating utilities, particularly with respect to hearings, findings and judicial review". As to these, counsel says (Resp. Br. 30):

> "This argument overlooks entirely the provisions of The Administrative Procedure Act approved June 11, 1946 • • • which fully covers all these matters: Sec. 7 (hearings), Sec. 8 (decisions), Sec. 9 (imposing requirement for hearings and decisions as provided in Sections 7 and 8 in case of application, revocation and expiration of licenses issued by Federal Agencies), and Section 10 (judicial review)."

Putting aside the fact that the Administrative Procedure Act was passed two years after the filing of the complaint for injunction alleging supersedure, and thirty years after the United States Warehouse Act was passed, counsel is completely mistaken. The Administrative Procedure Act by its very terms does not apply to the United States Warehouse Act in the manner claimed.

Section 7 specifies hearing and Section 8, decision requirements, but then only in those proceedings where "adjudication [is] *required by statute* to be determined on the

record after opportunity for an agency hearing." (Sec. 5) The United States Warehouse Act, with respect to the regulatory issues here involved, does not authorize an adjudication, that is, the "agency process for the formation of an order", nor provide for hearings, or require a determination after opportunity to be heard. Even a casual reading of the Administrative Procedure Act should reveal that Sections 7 and 8 prescribe minimum requirements for hearings and decisions only where a regulatory statute itself makes affirmative provisions for decisions and hearings. That act does not apply here.[13]

Section 9 deals with licensing (a subject with which we are not here concerned), and serves to amplify the secretary's present regulations on that subject.

Section 10, judicial review, again has no application to the United States Warehouse Act or the regulatory issues here involved. That section "does not apply in any situation so far as there are involved matters with respect to

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[13]Legislative history of the Administrative Procedure Act emphasizes this fact. S. Rept. No. 752 on S. 7 to 79th Cong., 1st Sess., Nov. 19, 1945.

Page 7:

"No hearings are required by the bill unless statutes already do so in a particular case."

Page 8:

"In each case, where other statutes require opportunity for an agency hearing, sections 7 and 8 set forth the minimum requirements for such hearings and the agency decisions thereafter * * *."

"Where existing statutes require that * * * particularized adjudications (called 'orders' in the bill) be made after agency hearing or opportunity for such hearing, then section 7 spells out the minimum requirements for such hearings, section 8 states how decisions shall be made thereafter, * * *."

Page 20:

"As heretofore stated in connection with sections 4 and 5, the bill requires no hearings unless other statutes contain such a requirement in particular cases of either rule making or adjudication."

which * * * agency action is by law committed to agency discretion."[14]

Since the secretary is without authority to issue any order or directive (except to suspend or revoke a license), there is no "agency action" or "final agency action" which can occur for which judicial review is provided. (Sec. 10(c) of the Administrative Procedure Act)

The inadvertence of counsel and the inapplicability of the Administrative Procedure Act to the regulatory issues here involved serve to highlight the fact that the United States Warehouse Act is not a regulatory statute, does not provide for utility regulation, and is therefore not amenable to the basic requirements of orderly administrative process and law.

In connection with our discussion of the United States Warehouse Act, we emphasized the fact that licenses issued are not required in order to conduct even interstate warehousing service, but are applied for voluntarily. They are permissive licenses. This system of securing voluntary submission to federal supervision negatives the claim of a broad utility regulatory system intended by Congress. Respondents argue that the voluntary or permissive aspect of licensing does not affect the situation, and then go on to urge erroneously (Resp. Br. 20):

> "By way of comparison, national bank charters are also permissive and voluntary but once having been organized as a national bank, *immunity from state systems of regulation follows.*"

This statement is not supported by any authority. Indeed, it is violently in conflict with this court's decisions in many cases, and is highly misleading.

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[14]S. Rept. No. 752 on S. 7 to 79th Cong., 1st Sess., 1945, p. 26.

In *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 248 (1944), a state law was sustained which authorized attachments of depositors' accounts even though in a national bank. Mr. Chief Justice Stone, speaking for the court, stated:

> "*This Court has often pointed out that national banks are subject to state laws,* unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."

In *McClellan* v. *Chipman*, 164 U.S. 347 (1896), the court sustained a Massachusetts statute, forbidding preferences through property transfers by insolvents, against the claim of conflict with a federal act authorizing national banks to take mortgages and conveyances of real estate for previous debt. The court qualified its entire discussion by stating (p. 360-1):

> "Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation."

In many other cases this court sustained state regulation in the face of claimed conflict with the National Banking Act.[15]

We respectfully submit that the United States Warehouse Act provides only for limited and circumscribed con-

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[15] *Lewis* v. *Fidelity and Deposit Co.*, 292 U. S. 559 (1934)—upholding a state law creating a lien upon the assets of a national bank for state funds deposited therein; *First National Bank* v. *Missouri*, 263 U. S. 640 (1924)—state law enforced prohibiting the establishment of branch banks; *Waite* v. *Dowley*, 94 U. S. 527 (1877)—sustaining state law requiring national banks to transmit to town clerks a list of shareholders.

Of course, where an irreconcilable conflict exists between a state banking regulation and the National Banking Act, the state act naturally would be superseded.

trol of such activities of warehousemen as are necessary to insure a dependable warehouse receipt; that in no respect is it a utility regulatory statute, nor does it delegate to the secretary any affirmative powers to prescribe rates, service, practices or financial conditions for the future operations of a warehouse utility. Furthermore, the secretary cannot grant any of the relief that is being sought before the Illinois Commission. There can be no conflict or inconsistency between the federal and state systems involved, and there is no ground here for the invalidation and supersession of traditional state functions that now exist in forty-one states.

III.

THE 1931 AMENDMENT DEALS ONLY WITH THE LIMITED SUPERVISORY CONTROL OF THE UNITED STATES WAREHOUSE ACT AS ORIGINALLY ENACTED. IT WAS NOT INTENDED TO SUPERSEDE STATE UTILITY REGULATION NOT PROVIDED IN THE FEDERAL ACT.

The 1931 amendment to Section 29 did not have for its purpose the exemption of federally licensed warehouses from *all* state utility regulatory laws, as counsel would imply. Prior to 1931, the United States Warehouse Act imposed a measure of control upon grain warehouses. Numerous state laws also regulated such warehouses. Some states provided regulation not only within the limited field which the federal government had entered, but in a much wider field. Congress was not interested in the wider field. Its interest in the limited field was only moderate—so much so that it made state laws supreme and superior in the event of conflict.

This system of control proved unsatisfactory, so that in 1931 Congress decided that in the limited field in which the United States had entered the states should no longer be supreme, but the power and authority delegated by the United States Warehouse Act should be. It is clear that

the 1931 amendment in no measure affects the wider field of regulation lying outside the limited supervision and control provided by the United States Warehouse Act. This is inescapable because no enlargement of the scope of the federal act was provided and no delegation of affirmative utility regulatory power occurred.

What proved unsatisfactory under the United States Warehouse Act as it existed prior to 1931 was not co-existence of state regulation of federal licensees, but only the fact that where specific federal and state controls coincided or conflicted the federal act became subservient.

The limited purpose of the amendment is made clear in the committee reports and congressional debates, where "conflicts" with state laws and the resultant subservience of federal requirements are emphasized as the issue sought to be resolved. It is further made clear in a letter dated May 28, 1930, from the Federal Farm Board to the Chairman of the Senate Committee on Agriculture, and attached to the senate report.[16] The letter states:

> "The Farm Board is very deeply interested in the proposed amendment to the warehouse act, known as H. R. 7, for the reason that at the present time there is certain conflict in the warehouse measures as between the State and the Federal Governments, *which is sought to be cleared up by this amendment.*"

We contend that the federal act is exculsive only with respect to the circumscribed powers and limited supervision expressly delegated to the secretary. This is clearly the import of the court's decision in *U. S.* v. *Hastings*, 296 U. S. 188, 199 (1935), where the amendment to Section 29 is discussed and its limits recognized, when the court stated:

> "* * * while the amendment asserts the exclusive authority of the Secretary of Agriculture, it has relation to the authority conferred by the Act, * * *."

[16] S. Rept. No. 1775, 71st Cong. 3rd Sess., p. 3.

The government appears to agree with this position, for they say (Govt. Br. 25):

> "The field occupied by Congress is measured by the scope of the Secretary's authority under that act * * *. It is only in the field in which the Secretary's authority is exclusive that the State statute is superseded."

Our position is erroneously described as contending for continued state authority because the "State statute embodies a better method of regulation". (Govt. Br. 24) We urge that the federal act is silent—it does not delegate authority—with respect to the regulatory issues over which we seek to have the Illinois Commission act. The secretary is without affirmative utility regulatory powers, and is impotent to grant any of the relief we seek.

The concept of "dual regulation" has been misconceived. Where the state and federal agency both have final authority with respect to a specific subject matter, dual regulation exists. An example of that situation occurs under the Federal Power Act, where the commission is authorized to prescribe a system of accounts, and at the same time the act compels the utilities affected to adhere to accounting orders and systems of accounts which may be prescribed by the states. (16 U. S. C. Sec. 825) But where the authority of the state is being exerted upon a specific subject matter of regulation over which the federal government has no power or has not acted, dual regulation is not present.

In effect, counsel contends that merely because Congress legislated in the broad field of public warehousing, any state requirement imposed upon such warehouses would be dual regulation. This court has long recognized the permissive character of state regulation in a general field in which some

federal authority has been exercised, so long as the precise subject matter of federal control is not involved, or an irreconcilable conflict does not exist. That this is true would seem to be conceded by the government when they say (Govt. Br. 25):

> "* * * the State is not foreclosed by the Federal Warehouse Act from adopting suitable labor regulations, fire control ordinances, zoning laws, or other statutes dealing with subject matters not covered by the Federal statute."

And we say the state is not foreclosed from exercising utility regulatory authority over public warehouses even though federally licensed, for that is a subject matter not covered by federal statute.

Counsel for the government seek to sweep away the express congressional recognition of co-existing state authority as contained in Section 29. They argue that while the secretary, by that Section, is authorized to cooperate with state officials charged with enforcement of state warehousing laws, such cooperation is intended to cover only the operation of state laws upon non-federal warehouses. (Govt. Br. 39) Counsel read into the Section a restriction that is unwarranted. The statute deals broadly with "State laws relating to warehouses". It does not limit the type of warehouses to state houses alone. Cooperation by its very nature must relate to warehouses over which both the secretary and state officials have some supervisory authority, otherwise, no field for cooperation exists.

Significantly, Section 29, after authorizing the secretary to cooperate with state officials charged with the enforcement of state warehouse laws, continues by providing:

> "*but* the power, jurisdiction and authority conferred * * * under this Act shall be exclusive * * *" with respect to federal licensees.

This second clause refers to federally licensed warehouses. The use of the word "but" to provide the transition from the clause authorizing cooperation engrafts an exception upon the field of authorized cooperation with respect to federally licensed warehouses. In other words this section must be read as authorizing the secretary to cooperate with state regulation affecting *federal* warehouses, "but" the specific powers delegated by the act are exclusive, again with respect to those federal warehouses. In this manner Congress emphasized that state utility regulation not provided in the federal act was preserved, and at the same time laid the ground for a coordination of state and federal efforts.

The point is made that because of the 1931 amendment, state regulation of rates, services, practices and financial conditions would infringe federal policy. That contention begs the question, for what is the federal policy expressed in the United States Warehouse Act? Obviously, Congress sought to foster a dependable warehouse receipt, to promote a warehouse receipt system which bankers could rely upon. The federal act assures that a federal receipt will be supported by a proper amount and quality of agricultural products. State utility regulation could not conceivably impede the attainment of that object and that policy. If a state were to fix just and reasonable rates or require an improvement, or expansion of warehousing service, or eliminate self-preferences and other discriminations, or supervise security issues and other financial transactions to prevent financial excesses, the interest of the farmer, of the receipt holder and of the banker would be additionally protected. Nor would the secretary be in the least impeded in his limited supervisory functions or responsibilities. No recognized federal policy could be adversely affected by the vigorous exercise of affirmative state warehouse utility regulation. Counsel has not indicated what federal policy it is that would be so infringed.

IV.

THE MAJOR STATE REGULATORY ISSUES INVOLVED.

Respondents argue that since we failed to concede conflict "in the many points of impact with the federal law", the 1931 amendment would seem to be an empty gesture. (Resp. Br. 34)

Petitioners have not advanced such a position, but have conceded that the secretary has exclusive power, but then only with respect to the authority expressly delegated by Congress. The exercise of state power over the precise subject matter of regulation possessed by the secretary or in conflict with powers expressly conferred and exercised by him, has been superseded. Examples of such instances of control where the secretary is made supreme by the 1931 amendment are:

—Issuance and cancellations of licenses.[11]

—Prescription of the terms and conditions of federal warehouse bonds.

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[11] We had previously taken the position that even though a federal permissive license were secured, a state license might be necessary. We stated in the court below:

"We concede that the issue of possible supersession of the state license requirement in the face of a license already issued by the federal government is a highly controversial question."

Our position was based upon the difference between a voluntary federal license and one compelled under state law as a condition to doing business, and also by the fact that a substantial portion of the grain stored by the respondent warehousemen is handled entirely in intrastate and not interstate commerce. However, we recognize that once a federal license is issued, the states should not be in a position to prevent the commencement of warehousing operations because of the absence of a state license. The issuance of a federal license would appear to be one of the "exclusive" authorities granted the secretary. This, in effect, is the holding of the South Dakota decision in *In re Farmers Cooperative Assn.*, 8 N. W. (2d) 557 (1943), and gives effect to the rather ambiguous enactment of Congress in 1936 of Section 5(a)(7) to the Commodity Exchange Act.

—Supervision over the issuance and cancellation of federal warehouse receipts.

—Prescription of additional terms and conditions for federal warehouse receipts.

—Establishment of standards for agricultural products.

What petitioners do contend and what we believe to be irrefutable, is that with respect to the state regulatory issues invoked by the Rice complaint, and hereinafter discussed, the secretary is without the semblance of statutory power to grant any of the relief sought or to compel the correction of the abuses charged. In the absence of such regulatory powers in the secretary, comprehensive state public utility legislation should not be superseded.

A. State financial regulation of (1) contracts and arrangements with affiliates and other utilities; (2) sales, leases and encumbrances of utility property and assets; and (3) security issues, has not been superseded.

It is conceded by all parties, as well as the court below (R. 122), that the United States Warehouse Act contains no provision dealing with the above financial aspects of public warehousing. The government further concedes that the conclusion to be drawn on this point "is not free from doubt", but urges supersedure on the ground that this type of security and financial regulation is ancillary to rate regulation. (Govt. Br. 65-6)

We submit that as to this area of regulation where concededly no federal authority is present, it must be obvious that state regulation is permissible.[18]

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[18]Respondents' reference to *Oregon-Washington Railroad & Navigation Co.* v. *Washington*, 270 U. S. 87 (1926) is not in point. In that case Congress had established a system of quarantine for interstate movements of agricultural products which could be invoked by the Secretary of Agriculture. The state of Washington estab-

Respondents, in order to establish a relationship between these financial controls and the federal act, present a hypothetical case of a warehouseman required by the secretary, acting under Section 3, to install new equipment for which he must borrow money and issue securities. They assume that if such financial transactions were subject to state approval, a refusal of permission would result in revocation of the federal license. At the outset it should be remarked that the secretary does not have the power and cannot require the installation of new equipment, or the improvement of warehousing facilities. The example, therefore, lacks proper foundation. But accepting the hypothetical situation for the purpose of argument, if the warehouse utility sought to issue securities to finance an improvement, the necessity of submitting the proposed issue to state commission scrutiny to protect the public interest—investors as well as consumers—is sound and well-accepted public policy. The government concedes that such security issues would have to conform to state Blue Sky laws. (Govt. Br. 66) No reason can be advanced why the security issue should not also be subject to public utility regulation. The only difference is that utility regulation is more comprehensive and protects broader public interests.

Basically, the hypothetical fear of a state rejection of a proposed sound security issue needed to support a construction program, is too remote for serious consideration.

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lished a quarantine against alfalfa, although the secretary had not acted. State action was invalidated on the ground that Congress had empowered the secretary to take the precise action involved, and had entrusted him with the discretion of determining whether a quarantine was necessary or not. Since no federal quarantine had been established, it was presumed the secretary had reached the conclusion no action was necessary. The state prohibition, therefore, was in direct conflict.

Bikle, *The Silence of Congress*, 41 Harvard L. Rev. 200 (1927) deals with the problem of constitutional prohibitions of state action because of the need for national uniformity. The doctrine does not apply here. See Govt. Br. 15.

The attempt by the government to secure state supersedure by urging that the absence of federal powers indicates "that Congress intended to accomplish its regulatory objectives without the exercise of those controls" (Govt. Br. 67), is violently opposed to accepted legal doctrine and to the position the government itself has announced throughout its brief. The reference to the *Cloverleaf* case does not lend support. As we previously pointed out, actual conflict was the point upon which the decision turned, and as the court stated (p. 169):

> "* * * since there was federal regulation * * * there could not be similar state regulation of the same subject."

B. The power of the Illinois Commission to fix and determine just and reasonable rates has not been superseded.

Respondents and the government differ sharply with respect to their concept of the secretary's rate powers. The government flatly contends that "the Federal act and regulations provide a complete system for regulating the rates charged * * *." (Govt. Br. 45) Respondents, on the other hand, scrupulously avoid such a position, and concede that the secretary cannot initiate, fix or determine a warehouse rate, (Resp. Br. 37)[19] but nevertheless, they urge that "* * * Congress did not intend that the states shall have any power to regulate the rates and charges * * *" of federal licensees. (Resp. Br. 42)

We will first reply to the government's position.

The only federal statutory provisions dealing with warehouse rates is Section 25 permitting the secretary to suspend or revoke a voluntary license if "unreasonable or

[19]See also our original brief p. 53, footnote 16, setting forth respondents' position before the Circuit Court of Appeals.

exorbitant charges have been made for services rendered", and Section 18(e), providing that federal warehouse receipts shall set forth the rate of storage charges.

From these meager provisions, it is impossible to construe rate regulatory authority. The function exercised under Section 25 to cancel a permissive license can be exercised only as a result of *past* exorbitant charges that "have been made for services rendered". The secretary cannot fix or regulate rates for the *future*. The distinction is substantial. The provision in the United States Warehouse Act is merely the expression of a common law obligation imposed upon public service companies not to charge exorbitant rates. The secretary's function in instituting license cancellation proceedings is quasi-judicial, but the fixing of rates for the future, the real import of utility rate regulation, is a legislative function. See *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 225-6 (1908) The government's position is completely disposed of by this court's decision in *Interstate Commerce Commission* v. *Cincinnati, etc. R. Co.*, 167 U.S. 479 (1897). The court there held that the Interstate Commission was without rate regulatory authority even though the *statute* (not regulations) required rates to be just and reasonable, prohibited unreasonable and discriminatory rates, provided for the filing and publishing of schedules and empowered the commission to enforce and execute the provisions of the act. The court refused to infer rate regulatory powers, saying (pp. 494-5):

> "The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. * * * the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of con-

struction would tolerate a grant of such power by mere implication."

A distinction was drawn between the quasi-judicial function of determining that a past charge was unreasonable, and the legislative function of fixing a rate for the future (p. 499):

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable,—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future, —that is a legislative act."

Finally, it was pointed out that the statutory incorporation of the common law duty that rates be reasonable does not imply a delegation of power to regulate rates (pp. 505-6):

> "Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future."

In the face of this decision, if Congress sought to delegate rate fixing authority, it was on notice of the method it would have to pursue to do so. Congress and the legislative specialists of the Department of Agriculture have provided for rate regulation many times without difficulty. We suggest that warehouse rate regulation was properly and intentionally withheld from the secretary because of the existence of such regulation on the state level.

The government finds support for its position in the regulations and practices of the secretary. These regulations cannot secure for the secretary rate fixing powers if the statute has not delegated that power. The regulations however, have been misconstrued.

The secretary, pursuant to the authority to suspend or revoke a license if a past rate was exorbitant, has provided by regulations for information with respect to the rates being charged. He has required that a license application be accompanied by the rates to be charged, when rate changes are made, they are to be filed with him, and finally the warehouseman must keep his rates posted. (Reg. 5, Section 3, 7 C.F.R. 102.35)

The secretary has not sought to pass upon the rates filed, or to approve or reject them. He has by regulation merely asked that they be filed and kept current, a proper and reasonable administrative act. But the only legal authority he can exercise and the very limit of his power is to institute a license suspension or revocation proceeding if a past rate was exorbitant. If the warehouseman determined to continue making the same charges, or felt that the secretary was in error, the voluntary license might be revoked, but the warehouseman would be entirely free to continue charging those rates. The public would not be benefited or protected.[20]

In another respect we submit the government is in error. Throughout its argument it speaks of the secretary as determining that a submitted rate is "reasonable". (Govt. Br. 46-51) The secretary's power is limited to the cancellation of a license when he finds that a past rate is exorbitant or unreasonable. He has no authority to make a determination except as a part of a license cancellation proceeding, and the record does not show that he has ever made a determination of reasonable rates either in a license proceeding or otherwise. Rates may validly range from a level just above confiscation to a rate that is so high as

[20]With respect to the dilemma in which the secretary finds himself under a permissive license, see statement contained in footnote 12, p. 14, *supra*.

to be excessive or exorbitant. Reasonableness includes a wide band of rates, and is not a sharp line. The administrative function of establishing just and reasonable rates involves the exercise of informed judgment and discretion to fix a rate resting within the band of reasonableness. The secretary is without the power or the facilities to exercise such judgment. He may act only when a rate is so excessive as to become exorbitant.

Frequent reference has been made to this concept of a range of permissive rates which may be established in the administrative utility regulatory process. In *State Public Utilities Commission* v. *Springfield Gas & Elec. Co.*, 291 Ill. 209, 125 N.E. 891 (1920), the court said (125 N.E. 895):

> "The rate established must be just and reasonable, both to the public and to the utility. In Public Service Gas Co. v. Utility Com'rs., 84 N.J. Law, 463, 87 Atl. 651, it is said that a just and reasonable rate can never exceed—perhaps can rarely equal—the value of the service to the consumer, and on the other hand it can never be made by compulsion of public authority so low as to amount to confiscation; that a just and reasonable rate must therefore certainly fall between these two extremes, so as to allow both sides to profit by the conduct of the business and the improvement of methods and increase of efficiency; that justice to the consumer, ordinarily, would require a rate somewhat less than the full value of the service to him, and justice to the company would ordinarily require a rate above the point at which it would become confiscatory; * * * The property of the public utility is devoted to the public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered."

See also *Banton* v. *Belt Line Ry. Co.*, 268 U. S. 413, 422-3 (1925).

The government repeatedly refers to alleged department practice to support its claim that federal rate regulation exists. These references are completely outside the record. The practice of counsel, we earnestly suggest, is highly reprehensible. The statements exaggerate what actually has been done, and are seriously misleading. This bland use of unsupported matter not in the record must be viewed in the light of the fact that the Department of Agriculture (then the War Food Administration) presented an affidavit in the District Court, allegedly setting forth department practice—but this affidavit was rejected by the District Judge, since it was completely argumentative and contained largely conclusions rather than recitations of fact. When the department was denied the opportunity of establishing alleged practices by innuendoes, and was held to a factual presentation, it abandoned the effort. The inference is clear that no facts existed. No further attempt was made to cure these objections and present a proper affidavit. Instead, the government remained silent, and now recites as facts matters which go even farther than the recitations in its rejected affidavit. We request that the court completely disregard such improper references. The respondents, who participated in all phases of this proceeding and presented affidavits on this point, correctly summarized the record with respect to the rate activity of the secretary as consisting of the filing by each warehouseman of a schedule of rates with the secretary. (Resp. Br. 8)

At the time this proceeding was before the District Court, we had made an investigation of the Federal Warehouse Section and were prepared to dispute the claims made by the department. When the department, however, failed to present any evidence of their alleged practices, either through a proper affidavit or testimony, there was nothing for us to answer. In view of the government's

present unfair action, and without waiving our objections thereto, we feel constrained to advise the court of the results of our investigation.

After consultation with the administrators of the United States Warehouse Act, we found the following:

1. While an application for a license is accompanied by proposed rates, no particular inquiry as to such rates is made, and the applicant is not required to justify the reasonableness of the rate proposed.

2. In only one instance was the issuance of a license temporarily withheld because of rates. (Apparently referred to by the government in its brief on p. 48 as an example of repeated practice.) That instance involved a country elevator in Kansas who submitted rates which granted free storage if the storer did not remove his grain, and imposed a charge of 5¢ per bushel upon its removal. The rates were designed to compel storers to sell their grain to the warehouseman involved. An obvious fraud upon the farmers was intended.

3. The Warehouse Section has never held a formal hearing concerning a proposed change of rates.

4. No federal license has ever been suspended or revoked on the ground that unreasonable or exorbitant rates were being charged.

5. The Warehouse Section does not have a rate section or a unit of trained accountants, economists and rate analysts to deal with warehouse utility rate problems.

We say unqualifiedly that there has been no federal regulation of federal warehouse utilities—and that if there had been such regulation the respondents would have made a record which would have definitely shown it.

The government, in its references to department practice, has sought to demonstrate that rates are changed by warehousemen through negotiation or persuasion. (Govt. Br. 46) Even if this were true, and we deny that this has been done in any "substantial number of cases", it does not establish the *power* in the secretary to *compel* any rate changes. Negotiations or conciliation cannot take the place of positive rate regulatory functions supported by legal sanctions. The possible cancellation of a voluntary license is no answer to the serious utility regulatory problem here presented.[21]

Respondents seek to further their claim of supersedure of state regulatory powers on the ground that a theoretical or speculative conflict between state and federal authority may occur. They concede an absence of affirmative rate making powers in the secretary, but they urge that because they are required by regulations to file their rates with the secretary, and because the secretary accepts a rate for filing, the state commission cannot exercise *bona fide* utility rate regulatory authority. Our original brief, pp. 58-60, disposes of this position.[22]

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[21] It would appear that respondents argue that their federal license is "valuable" largely because on their theory it immunizes them from effective state regulation. They say (Resp. Br. 39):

"If the licensee fails to conform to the rate determined by the Secretary to be reasonable, his valuable federal license is revoked and he will immediately be subjected to state regulation."

[22] We do not concede that any of the state's rate regulatory authority has been superseded, as respondents erroneously assume (Resp. Br. 56-7), including the state statutory requirement that warehousing rates be filed with the Illinois Commission, properly published, and that no rate be charged other than those so filed and published. The requirement by the secretary that rates be filed with him so that he may be kept informed does not conflict with or supersede the comprehensive state provisions which are part of the general delegation of power to fix and regulate warehouse utility rates.

Counsel for respondents rely principally upon the case of *Gulf, etc. R. Co.* v. *Hefley*, 158 U.S. 98 (1895), for the proposition that a federal statute which requires a rate to be filed with a federal agency precludes state rate regulation. The case does not support that proposition. The facts were that a Texas statute made it unlawful for a railroad to collect a greater sum than was specified in the bill of lading, and provided as damages the full amount of the freight charges for each day of delay. The Interstate Commerce Act then in force, while not granting authority to the commission to establish rates, nevertheless did require the railroads to print and post schedules at each station, and prohibited a carrier from collecting a greater or lesser compensation than the schedules provided, under pain of severe penalty—a fine not exceeding $5,000, and imprisonment not to exceed two years, or both. The railroad's own bill of lading contained a newly established lower interstate rate, of which the railroad had failed to notify its agent at the involved station so that the posted rates were different. The suit was for damages because of a one-day delay.

The case is distinguishable on a number of grounds.

First, the state requirement that the rates on the bill of lading be adhered to was superseded because a direct and positive conflict of duties occurred with respect to a single precise issue. The federal act required adherence to the rates established in schedules. The court emphasized that Congress had legislated "upon the precise subject matter" (p. 104). The two acts, when put side by side, reveal a startling similarity, except for the requirement of adherence to the rate in the bill of lading, in one instance and the published schedule of rates in the other. The two statutes provided:

Texas statute	*Interstate Commerce Act.*
"* * * it shall be unlawful	"* * * it shall be unlawful
for any railroad company * * *	for such common carrier
to charge and collect, or to endeavor to charge and collect,	to charge, demand, collect, or receive
from the owner, agent or consignee of any freight * * *	from any person or persons
a greater sum	a greater or less compensation
for transporting said freight * * *	for the transportation of * * * property * * *
than is specified in the *bill of lading.*"	than is specified in such *published schedule of rates* * * *.*"

The court made it clear that the state act was superseded only because it covered a precise single issue upon which Congress had legislated in a conflicting manner, when it distinguished the case of *C. & N. W. R. Co.* v. *Fuller*, 84 U.S. 560 (1873). There a state statute required railroads to establish rates on the first of October and to post rates at all stations, and provided a penalty for charging a higher rate than those posted. The state act was sustained, notwithstanding a federal provision granting authority to railroads to carry passengers and freight and receive compensation therefor. The court said (p. 103):

> "It will be perceived that the two statutes do not conflict, do not prescribe different rules, and only in a very general sense can be said to be in relation to the same subject-matter."

In the instant warehouse case, there is no federal regulation of the "precise subject matter" (p. 104)—the establishment of reasonable rates.

Second, the provision of the state act, if validated, would have permitted railroads to fix special rates and practice discriminations merely by inserting the rate on the bill of lading. The Interstate Commerce Act had as its main purpose the prevention of discriminations, and therefore it was essential to make the schedule of rates, rather than the bill of lading, the controlling rate, in order, as the court said, to avoid "favoritism". The United States Warehouse Act does not control rate discriminations.

Third, in the *Hefley* case, the rate involved was an interstate rate covering a shipment from Missouri to Texas. The warehouse rates are for the storage of grain in Illinois.

Fourth, a violation of either the state or federal statute in the *Hefley* case would have subjected the railroad to serious penalties. No penalties are imposed under the United States Warehouse Act if a warehouseman refuses to file a rate, other than to suffer the possible suspension or revocation of his permissive license.

Finally, the court in the *Hefley* case did not determine that comprehensive state utility rate making powers which operate as an aid to an implied federal purpose of preventing exorbitant rates would be superseded or be in conflict with the federal provisions. In fact, such an extension of the holding in the *Hefley* case is negatived by this court's decision in *Smyth* v. *Ames,* 169 U.S. 466 (1898). In that case the validity of state regulation of intrastate railroad rates was questioned on the ground of supersedure. The railroad involved, the Union Pacific, had been consolidated by an act of Congress which contained a provision summarized by the court as follows (p. 521):

> "* * * Congress may reduce the rates of fare on the Union Pacific Railroad if unreasonable in amount, and may fix and establish the same by law whenever the net earnings of the entire road and telegraph, ascer-

tained upon a named basis, should exceed 10 per cent upon its cost, exclusive of the 5 per cent to be paid to the United States."

The supersedure issue was stated as follows (p. 519):

> "The argument is that Congress by this enactment has reserved to itself exclusive control of rates, interstate and local, to be charged on the Union Pacific Railroad."

As to this the court said (p. 521):

> "Undoubtedly Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the states through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits."

In the *Smyth* case, therefore, although Congress had expressly assumed the authority under legislative contract to reduce the railroad's rates if unreasonable, and to fix a rate that would provide earnings of not to exceed a stated percentage, and despite this regulatory power to prevent exorbitant and unreasonable rates, state utility rate regulatory powers were sustained.[23]

In conclusion, we urge that the secretary has not been delegated affirmative utility rate regulatory powers. He can-

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[23]The other cases cited by counsel under this heading are not in point. *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242 (1906) stands for the well-established principle that a carrier cannot make special deals in departure from its schedule of rates. By this rule, the primary purpose of the whole Interstate Commerce Act, of preventing discrimination, is given effectiveness. No state law was involved.

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907) concerned the question of primary jurisdiction over reparation issues. The commission is considered the first tribunal in which reparations can be sought in order to protect against conflict in decisions and consequent confusion and discrimination in rates charged by the same carrier. No state law was involved.

not fix and determine the warehouse rate that must be charged in the future. His authority extends no farther than the institution of license proceedings in the event a past rate for services already rendered is found to be exorbitant. No possible inconsistency or conflict between this very limited function and the comprehensive utility rate making powers of the Illinois Commission is discernible. It is respectfully suggested that the United States Warehouse Act is intended primarily to deal with the warehousing problems of country elevators, and not of the great warehouse utility institutions located in terminal markets. The rate reference in the federal act thus becomes a crude or elementary means of protecting the farmers against extortion, but does not undertake the vast economic problems inherent in the proper establishment of just and reasonable rates for the utility institutions that provide the public warehousing services at our terminal markets.

C. The state constitutional prohibition against public warehousemen engaging in the conflicting function of grain merchandiser and dealer is not superseded.

The Illinois State Constitution has been construed to prohibit public warehousemen from competing with their own customers, as they necessarily do, when they deal in and merchandise their own grain. Rice seeks to have the Illinois Commission enforce future compliance with this provision. The strong public policy that prompted such state action was well stated by the Illinois Supreme Court in *Central Elevator Co.* v. *People*, 174 Ill. 203, 51 N.E. 254 (1898), as follows (51 N.E. 256):

> "The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty towards the public. The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid

> legitimate grain dealers, by exacting from them the established rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators, the position of equality between them and the public whom they are bound to serve is destroyed; and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. • • • In exercising the public employment for which he is licensed, he cannot be permitted to use the advantage of his position to crush out competition, and to combine in establishing a monopoly by which a greater accumulation of grain is in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course. The defendants are large dealers in futures on the Chicago Board of Trade, and together hold an enormous supply of grain ready to aid their opportunities as speculators. The warehouseman issues his own warehouse receipt to himself. As public warehouseman he gives a receipt to himself as individual, and is enabled to use his own receipts for the purpose of trade, and to build up a monopoly and destroy competition. That this course of dealing is inconsistent with the full and impartial performance of his duty to the public seems clear."

This state prohibition, counsel urge, has been superseded because of the requirement of the United States Warehouse Act in Section 18(i) that a federal warehouse receipt contain a statement of the warehouseman's interest in grain covered by the receipt, if that is the fact. Here, again, we find the respondent warehousemen and the government at odds with respect to the interpretation of the federal act. Respondents claim that Section 18(i) "authorize warehousemen to store their own grain". (Resp. Br. 47) The government, on the other hand, concedes that Section 18(i) "does not affirmatively authorize a licensed warehouseman to store his own grain". (Govt. Br. 63)

Obviously, the federal provision merely requires this specification of ownership because there is not a "strictly disinterested custodianship". (Reg. 4, Sec. 1(c), 7 C.F.R. 102.18c) The required statement is similar to the specification set forth in the Uniform Warehouse Receipts Act. No federal policy can be evolved from this provision which is in such common usage, other than the policy that there be a statement of ownership when it exists. If such ownership is prohibited in some states, the necessity for the statement will not occur.

No attempt is being made to vary the form or term of a federal warehouse receipt, as respondents erroneously argue. (Resp. Br. 48) We grant that the form of federal warehouse receipts must comply with the federal statute. But full compliance will occur with the state prohibition in effect, since in that event the warehouseman will not store his own grain, and therefore no statement of ownership need be made.

Section 5(a)(7) of the Commodity Exchange Act has no relevancy. (Resp. Br. 48) That section merely requires that federal receipts shall be accepted in satisfaction of futures contracts. It does not provide that receipts covering the warehouseman's own grain must be made available for tender on futures contracts. The statute will be fully satisfied if federal receipts covering public grain are accepted in satisfaction of futures deliveries.

The case of *Missouri Pacific R. Co.* v. *Porter*, 273 U.S. 341, 345 (1927), is not in point. There the Interstate Commerce Act required carriers to establish rules affecting the form and substance of bills of lading, and empowered the Interstate Commission to execute those provisions, and, after hearing, to fix reasonable rules and practices where it found them to be unreasonable. This complete federal regulatory system precluded a state law which prevented

a carrier from imposing conditions on a bill of lading that would limit its common law liability. In the instant case, the state duality prohibition does not infringe federal requirements with respect to the form or conditions of federal warehouse receipts.

The case of *Farmers' Grain Co.* v. *Langer,* 273 Fed. 635 (C.C.A. 8th 1921), is distinguishable on its face. The federal law imposed a requirement that an inspector shall have no interest in the business involved, while the state law said he may have an interest. In the instant case, there are no federal requirements and no possibility of conflict with the state prohibition. This court has sustained state prohibitions supported by sound public policy, even though federal acts acquiesced or even authorized the practice: *Dickson* v. *Uhlmann Grain Co.,* 288 U.S. 188 (1933); *Minnesota, ex rel Whipple* v. *Martinson,* 256 U.S. 41 (1921).

D. Only state laws can deal with the discriminations and self-preferences practiced by public warehousemen. Such regulation has not been superseded.

Section 13 of the United States Warehouse Act is principally relied upon to supersede the Illinois Commission's complete powers to prevent discriminations and prescribe non-preferential rates and practices. Again the government and respondents take a conflicting view with respect to the meaning of a federal provision, this time with respect to Section 13. Respondents urge that the section "refers to storage of grain during the whole storage process" (Resp. Br. 45), while the government states the section prohibits discriminations only at the time of receipt for storage. (Govt. Br. 54) The section obviously prohibits a warehouseman only from discriminating between two individuals who are seeking to place grain in store. It requires him to "receive for storage" and conditions his obligation by the provision "so far as its (warehouseman's) capacity

permits". It deals with grain "tendered to him". The section was intended to deal with a situation that may occur in the small farm community where a single country elevator is able to squeeze a farmer seeking storage by refusing to grant facilities.

It is true, as the government contends, that the discriminatory refusal to grant storage may take the form of an arbitrarily excessive rate. But the problem we have presented for state regulation in the Chicago terminal market is of an entirely different character. In Chicago, by reason of the existing practices of the warehousemen, almost all, if not all, the grain in store is originally placed there by the warehouseman himself. He will then normally hedge his holdings of actual grain by making a short sale on the futures market. The public acquires an interest in such grain only when delivery is made by the warehouseman by tendering warehouse receipts. The public, therefore, first comes in contact with the warehouseman *after the grain is already in store.* It is then that the numerous self-preferences and discriminations begin.

A few examples should illustrate the evil practices which we charge. Grain is graded according to the United States standards, and "contract grade" is required for delivery. Grain which has features superior to contract grade commands a premium price. The grade standards provide certain leeway in each of the conditions graded. For example, contract grade may provide for a weight of 52 lbs. to 56 lbs. per bushel. Let us assume a warehouseman issued warehouse receipts held by the public for half of the grain in his warehouse. The other half belongs to him. All the grain is of contract grade, and therefore commingling is permitted. In such a situation we charge that it is customary for the warehouseman to mix and treat the grain so that the receipt holder will be delivered the very bottom of the

grade—52 lbs. with respect to weight—while the warehouseman retains the selected portions of the total grain in store, which may weigh an average of 59 lbs. and command a substantial price premium.

Discriminations in the release of transit billing arise out of the fact that varied through rates are offered to local points around Chicago, depending upon the point of origin of the shipment. No through transit rate has been provided by the railroads if grain originates on a water carrier. It is only after grain is loaded out of a warehouse pursuant to the demand of a receipt holder that he receives his bill of lading specifying his transit privileges. We charge that normally the receipt holder will be supplied with no transit privileges, or with a transit rate that is not as favorable as other transit tonnage available to the warehouseman. While this process is going on, the warehouseman is seeking to merchandise his grain. He will know where the market is at the time, and will retain for himself the transit tonnage that is most favorable to the transportation of grain to that market. We are asking for the prevention of this ever continuing selective process, which is exercised for the self-preference of public warehousemen, and in discrimination against their customers.

The consequences of these practices were discussed in *Central Elevator Co.* v. *People*, quoted on pages 40-1, *supra*: More recently, in October, 1932, the Department of Agriculture, Grain Futures Administration, issued a report entitled "The Public Elevator Situation in Chicago", wherein the effects of such elevator practices were described as follows (p. 83):

> "An important result of the mixing operations at public elevators is the reluctance of many purchasers of grain to receive delivery on futures contracts. This, combined with elevator domination of the process of making delivery, has tended to reduce the quantity

delivered on futures contracts to a very small proportion of the futures contracts made. . . .

. . . .

"The small volume of futures contracts settled by delivery increases the possibility of manipulation in the delivery month, and allows the futures market in that month to be dominated by local conditions. The elevator operators' interest in deliverable grain frequently makes them an important factor in these local conditions."

And again (p. 85):

"If the Chicago Board of Trade is to provide dealers with an efficient futures market, it is imperative that the purchasers should have utmost confidence in the quality of the grain to be received; that published figures of grain in store by grades should be accurate; and that the situation in the delivery month should not be subject to domination by local conditions. The public elevator situation in Chicago is tending to impair these essentials, and has, therefore, an undesirable effect on the futures market."

The Federal Trade Commission, pursuant to resolutions of Congress, has investigated and made successive reports on the grain trade. In 1937 it submitted a report to Congress entitled "Agricultural Income Inquiry", wherein it was stated (p. 40):

"The warehouse storage situation is apparently worse today than at the time of the Commission's previous recommendations." (In 1924 and 1926)

The basis for the Commission's criticism included (p. 347):

"Public warehousing has for a long time been on the decline. This is especially true in the case of forwarding markets such as Chicago and Duluth. Various

> causes have been assigned for the decline. It has been attributed partly to the fact that the entrance of the public elevator proprietors into the grain business has made it impossible for a grain dealer to store in the public elevator in competition with such merchandisers who either have no storage to pay except to themselves, or have low cost for such storage, due to favorable leases of elevator property."

The Commission pointed out further that the "mixing of grain to 'skin grade' (to a point so near the bottom of the grade that it will be just above the top quality in the next lower grade)" is a "principal source of revenue to terminal warehouse operators." (pp. 350-3)

Sections of the United States Warehouse Act referred to by respondents and the government which allow the mixing of fungible goods of the same grade (Sec. 15, 16, 18) do not deal with the above problem. Rice has complained of discriminations and subtle self-preferences of various types. But the enumeration of such practices could not possibly cover the many other ingenious devices that now exist or may be evolved to achieve the same purpose—self advantage and preference to the warehouseman as against his public customer.

Rice has also complained of another form of discrimination—that is, the grant of an unduly preferential storage rate to the federal government. Respondents argue outside the record when they say that such preferential rates have been disclosed to the secretary. (Resp. Br. 43) It is true that the rate schedules filed contain express reservations by the warehousemen of the "right" to make "special deals" with large storers or with the government. But the terms and conditions and the inherent discriminations that may result from such "special deals" are not revealed on such schedules. The secretary, in any event, has not

approved any rate schedule.[24] He does not have that power, and has not exercised that function. If he received a schedule and recognized that preferences existed and did nothing about it, his lack of authority to act on the matter would only be emphasized.

It is not disputed that the secretary has not been granted the affirmative authority to order or direct or compel the elimination of any form of discrimination. He cannot fix and determine rates or practices for the future that are fair, non-discriminatory and non-preferential. This authority exists only on the state level. To deny the states this function would leave the discriminatory abuses referred to above, entirely uncontrolled.

Respondents argue that preferences to the federal government are not discriminatory. But this is an argument on the merits of the issue presented, and does not assist in determining relative power to rectify discriminations that are legally and factually found to exist. Cases cited are not in point. *General Shale Products Corp.* v. *Struck Construction Co.*, 37 F. Supp. 598, 603 (D.C. Ky. 1941) and 38 Op. Atty. Genl. 539, deal with the Robinson-Patman Anti-Price Discrimination Act. That act seeks to avoid price discrimination which effects a substantial lessening of competition. In the *Shale* case, it is pointed out that

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[24]In the Rice verified answer, we denied the allegations that schedules were duly filed and that they constituted proper and sufficient schedules setting forth the warehousemen's rates and practices. (R. 45) The affidavits filed by the respondent warehousemen did not include a copy of their schedules of charges. They recited only that they filed their schedules of rates, made no "change" in rates without filing a proposed schedule, and kept their rates posted. (R. 60-75) Despite respondents' failure to file their rate schedules, they now claim, without record support, that rate preferences were disclosed to the secretary. Their statements that "changes" in rates were filed with the secretary do not cover the rate rebates that may have occurred, which are not rate changes.

the government is not in competition with other buyers of the articles involved.

In *Emergency Fleet Corp.* v. *Western Union*, 275 U.S. 415 (1928), the court states, "it is faintly argued that the Western Union is entitled to the commercial rates * * *" since the Interstate Commerce Act prohibits discrimination. The court's answer to this suggestion is obviously based upon Section 22 of the Interstate Act, which provides "that nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States or municipal governments * * *." No similar legislative dispensation is found in the warehouse or public utility acts.

E. Only the state has the regulatory power to order the establishment of safe and adequate public warehousing service and facilities, or improvements and additions to such service and facilities. No supersedure of this authority has occurred.

The Rice complaint invokes the authority of the Illinois Commission to compel the improvement or addition to warehousing services and facilities whenever, after hearing, it is established that such services are inadequate or unsafe, or in other respects not serving public necessities. No claim is made that the secretary can order or compel a warehouseman to improve his warehousing facilities. For example, suppose additional grain drying machinery were required to fulfill the needs of adequate public warehousing service. The secretary cannot deal with the problem, but the state is fully and legally equipped.

We submit that the decision of this court in *Atchison T. & S. F. R. Co.* v. *Railroad Commission*, 283 U.S. 380 (1931) is conclusively determinative not only of the immediate

issue of service regulation, but also with respect to all of the utility regulatory issues here discussed. In that case the court recognized that the Interstate Commerce Commission was delegated authority to *approve* a railroad addition (construction of a union terminal). In fact, such federal approval had to be secured before construction could be commenced. Yet, in the absence of federal authority to *compel* that service improvement, the state of California was free to exercise its regulatory authority and compel construction. The court refused to supersede that state function. The Interstate Commerce Act is a complete and comprehensive regulatory statute, and deals broadly and generally with many problems of railroading service. In the absence, however, of the precise power to *compel* this type of addition to railroad facilities, state action was held to be permissible.

Respondents have erroneously implied that the Interstate Commerce Act sanctioned the state compulsory action in the *Atchison* case by some express provision. (Resp. Br. 53) That is not so. The federal act there, as here, was silent on the precise regulatory issue.

Sections of the United States Warehouse Act and the federal regulations cited to effect supersedure of state service regulation, deal with the care of agricultural products in store. These provisions seek to insure proper coverage of outstanding warehouse receipts.

We have already demonstrated the limited scope of Section 3 (original brief p. 65), which authorizes the secretary, upon license application, to determine that a warehouse is "suitable" for the storage of the "particular agricultural product" for which application is made. That section does not delegate authority to supervise, no less regulate, the adequacy of warehousing service and facilities. It does seem significant that respondents, in further describing

the authority granted the secretary by Section 3 to prescribe the duties of warehousemen with respect to the care and responsibility of stored products, scrupulously and repeatedly delete from the quoted section the qualification that the authority to prescribe such duties is "within the limitations of this Act". (Resp. Br. 51, 53. See also Govt. Br. 33, 57)

F. The state authority to pass upon the abandonment of public warehousing service has not been superseded.

No claim is made that the United States Warehouse Act controls the abandonment of service or requires secretarial approval before such abandonment occurs. That regulatory function is essential to prevent unwarranted reduction of public utility service and facilities.

The federal license is voluntary and permissive. Service may be suspended under the federal act at will, either before or after the license is surrendered. The secretary cannot prevent abandonments even though contrary to the public interest. State regulation in this field must therefore be completely unimpeded. A state action in preventing unwarranted abandonment of public utility warehousing service would not infringe upon the voluntary character of the federal license. It would serve to protect the public interest and give meaning to the dedication of property to the public use.

Respondents' argument in this connection approaches the ludicrous. (Resp. Br. 57-8) They present a hypothetical case of a federal inspection which reveals a totally unsuitable warehouse which cannot be repaired, and then they say with respect to this warehouse:

> "Unless it is abandoned, the warehouseman will lose his federal license. Is the state to have jurisdiction to permit or refuse this abandonment?"

This line of argument is put forth to defeat state authority. We had supposed that if a federal warehouse was unsuitable for storage, the federal license would be cancelled. Respondents so argued. (Resp. Br. 53) They also argue that if a warehouseman abandons his service he loses his license. (Resp. Br. 57) They now urge that if he *fails* to abandon, he will lose his license. But what is this hypothetical warehouseman going to do with his federal license after his services are abandoned? The possibility of being allowed by the secretary to retain his license certificate after the warehouseman has completely removed himself from any warehousing facilities or service, is a federal benefit which must not be allowed to infringe the exercise of the sovereign powers of the state. Furthermore, to assume that the state will prevent the abandonment of a warehouse that is unsuitable for storage is conjectural and unlikely.

As a test of respondents' position, suppose a majority of warehouses under state regulation wish to abandon their service. All they would have to do, is apply for a federal license and after securing the license, abandon their service with impunity. What then becomes of the public interest?

The right to pass upon the abandonment of service is part of the commission's power to regulate the adequacy of public utility warehousing services and facilities. We agree that authority over abandonment is meaningless without the power to regulate service.

CONCLUSION

There are six major regulatory issues involved before the Illinois Commission which the respondent warehousemen and the government claim to have been superseded. With respect to two of these issues, both parties concede that the federal act contains no provisions whatever dealing with the subject (authority over security issues and financial

transactions, and supervision over the abandonment of service). With respect to three of the remaining four regulatory issues, the positions of the respondents and the government differ sharply and depend upon contradictory and inconsistent interpretations of the United States Warehouse Act. Thus, in the case of rate regulation, the government claims that the secretary has been delegated complete authority to regulate rates. Respondent warehousemen, however, concede that the secretary does not have the authority to regulate or determine rates. In this connection it should be noted that the record does not disclose a single instance where the secretary conducted a rate proceeding.

In dealing with the state prohibition against warehousemen acting in a dual and conflicting capacity, the government admits that Section 18(i) of the United States Warehouse Act does not "affirmatively authorize" the warehousemen to act in a dual capacity, while the respondent warehousemen claim that it does so authorize them.

With respect to the power to regulate and prevent discriminations, the principal section relied upon for federal supersedure is Section 13 of the United States Warehouse Act. The government construes this section as preventing discriminations only in the receipt of grain, while the warehousemen contend the section applies not only to the receipt of grain, but covers the whole storage process.

The United States Warehouse Act has been in existence for over thirty years. The sharp differences in the interpretation of that act, put forward by two parties seeking to invoke its sanctuary against state regulation, makes apparent the fact that administration of the act has not effected a crystallized position as to the regulatory issues involved. There has been no evolution of regulatory principles because the act makes no provision for affirmative regulation, and none has occurred.

A federal statute upon which there is so little agreement by those espousing its supremacy does not furnish the necessary tools for the establishment of actual and positive conflict, or precise coincidence with state authority. Supersedure will not be ordered in support of presumed and indefinite federal functions.

Respectfully submitted,

IRVIN ROOKS,
LEE A. FREEMAN,

Attorneys for Daniel F. Rice, Joseph J. Rice, Walter T. Rice, and William F. Rowley, doing business under the firm name of Daniel F. Rice & Co., a partnership,
Petitioners.

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